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IN THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

Twelfth Report of Robert M. Hughes, Special Master.

SEABOARD AIR LINE RAILWAY v. THE CONTINENTAL TRUST
COMPANY.

Filed August 2nd, 1909.

In Equity. No. 587.

To the Honorable Judges of the said Court:

The undersigned, Special Commissioner, begs leave to make this his Twelfth report in the cause.

Some claims have been filed before him, in which a statutory lien is insisted on by virtue of sections 2485-2486 of the Virginia Code, giving parties who furnished certain kind of supplies to the Railway Company a lien therefor, if matured within ninety days from date when the last item of their account becomes due and payable. The following is a memorandum of these claims:

Baughman Stationery Co.,
Richmond, Va.

May 16, 1907,—Dec. 12, 1907, (current account).....	\$905.00
Less items subsequent to July 1, '07, pd.....	628.43
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	\$276.57

Stationery supplies,
Lien matured Petersburg, Va., June 4, 1909, Book 75
p. 171.

Edwin M. Pilcher, Atty.,
Richmond, Va.

Brown & Co., Incorporated,
Pittsburg, Pa.

Feb. 15, 1907,—Sept. 27, 1907 (current account),....	\$7,700.19
Less items subsequent to July 1, 1907, pd.....	3,332.57
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	\$4,367.62

belts, &c.
terms 30 days.
Lien filed Petersburg, Va.
May 30, 1908, Book 73, p. 425.
J. E. Heath, Atty.,
Norfolk, Va.
Hoopes & Townsend Co.,
Philadelphia, Pa.

May 8, 1907,—Dec. 4, 1907 (current account),.....	\$3,332.75
Less items after July 1, 1907, pd.....	769.40

\$2,563.35

Hexagonal nuts,

Lien recorded Petersburg, Va.

April 15, 1908, Book 73, p. 223.

Floyd Hughes, Atty.,

Norfolk, Va.

Willis, Smith, Crall Co.,

Norfolk, Va.

Dec. 27, 1906,—Nov. 4 1907 (current account).....	\$839.34
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Less items after July 1, 1907, pd.....	332.81
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\$506.53

office furniture.

Terms 6 months.

Lien recorded Petersburg, Va.

June 1, 1908, Book 73, p. 428.

Jeffries, Wolcott & Wolcott, Attys.,

Norfolk, Va.

All of these claims depend upon the question, whether the necessity of filing their claims in the Clerk's Office within ninety days, was obviated or suspended by the filing of the bill in this cause, or by the entry of the decree of reference.

It appears from the record that the bill was filed on January 1st, 1908, the receivers appointed on January 2nd, 1908, and the first decree of reference on February 6th, 1908.

As to one of the claims, that of Brown & Co., Incorporated, the question is involved, whether if the court proceedings suspended the running of the statute as to the time of filing his claim in the clerk's office at all, it was the filing of the bill or the entry of the decree of reference, as the last item of his bill became due on October 25th, 1907.

It is well settled that either the filing of the bill, or the entry of a decree for account suspends the running of an ordinary statute of limitation, and the later authority seems to preponderate in favor of the doctrine that in a general creditor's bill, it is the filing of the bill that stops the running of the statute, and not the entry of the decree of reference. *Richmond v. Irons*, 121 U. S., p. 27.

The question, therefore, is whether this principle as to the ordinary statute of limitations includes the steps necessary by state statute in order to perfect a statutory lien. It must be admitted that a statute of limitations and a statute of this sort are not exactly the same thing in all respects, as the former is

a statute of limitationss pure and simple, and the latter rather a condition on which a right is given, but the principle has been applied in this circuit in more than one case by judges of the highest attainments.

It was first held by Judge Paul in *Seventh National Bank v. Shenandoah Iron Co.*, 35 Fed., 436; then by Judges Goff and Hughes in *Newgass v. Atlantic & Danville R. R.*, 56 Fed., 676; then by Judge Hughes in *Newgass v. Atlantic & Danville R. R.*, 77 Fed., 712. These authorities have been questioned on the ground that they are not supported by the decisions on which they profess to be based; as those decisions relate to ordinary statutes of limitations, and not to statutes prescribing conditions on which a lien is given.

But it is not difficult to sustain the principle upon well known doctrines of equity, even conceding the inapplicability of those decisions.

When a court governed by equitable principles undertakes to handle a fund or a piece of property, it takes it as it finds it. It deprives no one of any right which he may have at that time. For instance, if an admiralty court permits a libel against a vessel on which a ship-wright is asserting a possessory lien, it protects and properly classifies the lien, although under ordinary circumstances loss of possession is loss of lien. Conversely, if a chancery court in administering the assets of a corporate vessel owner finds admiralty liens upon its vessels, it protects and properly ranks such liens, although under ordinary circumstances equity has no jurisdiction over such liens.

If then a court on taking possession of railroad property finds upon it inchoate liens not matured because the time for maturing has not expired, why force the creditor to go through the idle form of filing it in the clerk's office? Why not protect him as one of the necessary incidents of an equitable administration?

The maturing of a lien in the clerk's office is, after all, an act in pais. Its main object is to give notice to intending purchasers, as the law discourages secret liens. This reason ceases when the property is being administered in court. The court proceedings are accessible to all. The court can bar creditors who do not come in, so that the property goes into the hands of the purchaser free of secret liens. It is as easy for him to look through the court papers as it would be to explore the musty books of the clerk's office.

But I would feel bound to follow these decisions unless the most conclusive reasons were adduced against them, and even though I differed from their reasoning, which I do not. If, therefore, the bill in this cause stands on the same footing as a creditor's bill, I am of opinion and decide that those parties

who had not lost their right to mature their liens at the date, at least when the decree of reference was entered, can mature it at any reasonable time during the progress of the cause, even though more than ninety days after the date of the last item.

Nor can I see any reason why the decree of reference, rather than the filing of the bill should be the crucial period. It has been shown above that the later and better authority applies the date of filing the bill as to the ordinary statute of limitations, and if the analogy as to these statutory liens applies in one respect, they ought to apply in all. The filing of a general creditor's bill creates, as it were, a trust in favor of creditors, which necessarily implies a reference at some time during the progress of the cause, and the exact date of the reference is more a matter of convenience than a right. In the case last cited of *Newgass v. Atlantic & Danville R. R.*, 72 Fed., 712, District Judge Hughes expressly decided this as to a statutory lien. I am, therefore, of opinion and decide that if the statute is suspended at all, the suspension takes effect on the date of filing the bill.

This leaves open simply the question, whether the bill in this cause is in the nature of a creditor's bill and is governed by the same principles. I have had grave doubts on this subject, and have given it considerable thought, and so far as I know, or have been informed by argument of counsel, there is no express decision applying the above principles to a bill like this. An examination of the bill shows that it is certainly not in terms a creditor's bill, as it is filed by the debtor. It made certain creditors parties, and they subsequently come in and adopt its allegations and prayers, one of which is, that the creditors be convened, but after all it is in the last analysis a bill by the debtor in the nature of a bill *quia timet*, in which the corporation admits that its debts have gotten beyond its control, that its assets are in danger of being dissipated, and that the protection of the court is necessary. It might be best described as a bomb proof bill in the interest of the debtor.

But even conceding all of this, is there any reason why the same principle as to the running of a statute of limitations should not apply to it, as well as to a creditor's bill? The reason why the statute is suspended on filing a creditor's bill is that a trust is thereby created in favor of all creditors, and that, therefore, statutes of limitations are suspended. The nearest analogy which I have been able to think of, is a voluntary petition in bankruptcy. There too, the debtor is the promovent, seeking the protection of the court and turning over his assets to the administration of the court. In such a case, the statute of limitation ceases to run. There is some conflict in the authorities whether it ceases at the date of filing the petition, or the date of the adjudication, but the

same reasoning which would apply as between the filing of the bill and the entry of the decree of reference in a creditor's suit applies with equal force here, and makes the authorities which hold that the statute ceases at the time of filing the petition the best entitled to our respect.

This has been expressly held in *Eldridge in re*, 2 Hughes, 256; 8 Fed. Cas. No. 4331, which decides that the date of filing the petition is the controlling one. See also *Wright in re*, 6 Biss., 317; 30 Fed. Cas. No. 18068. There are cases which rather look to the date of the adjudication. *Graves in re*, 9 Fed., 816.

For these reasons, I am of opinion and decide that filing the bill in this case suspended the necessity of maturing the lien in the clerk's office, and that, therefore, the above parties are entitled to a statutory lien for their claims, which constitutes them privileged claims, and I hold that they should be paid as such, with interest up to and not later than January 2nd, 1908.

I attach hereto as exhibits, the documentary evidence relating to these claims.

Respectfully submitted,

Norfolk, Va., August 2nd, 1909.

ROBERT M. HUGHES,

Special Master.

Note.

See editorial comment, on p. 392, post.